

TOWN OF KITTERY, MAINE
BOARD OF APPEALS

APPROVED
August 19, 2014

Members present: Craig Wilson, Brett Costa, Gary Beers, Niles Pinkham, Brian Boyle

Members absent:

Staff: Heather Ross, Code Enforcement Officer

The meeting was called to order at 7:05 p.m.

Pledge to the Flag

Mr. Wilson noted Title 16.1.5.2.F.2 authorizes the Board of Appeals to hear the following Administrative Appeal.

ITEM 1: Puffer & Sons Land Management, Inc., Map 50 Lot 5, Mixed-Use (M-U); 421 U.S. Route 1. Pierre Puffer requesting Administrative Appeal request to the terms of Title 16, Chapter 3, Section 2.13, Title 16, Chapter 10, Section 3.6, & Title 16, Chapter 6, Section 4.1 to continue historical use of property as both auto repair and used auto sales.

Gregory J. Orso, Attorney:

- There is evidence of non-conforming use over the years.
- Letter from executor of Donnell estate (2011) testifying that the property has sold automobiles and has been a working garage for twenty one years.
- A Phase 1 Environmental Site Assessment Report by Windward Consulting, LLC, 2009: The historical study of the site was identified as auto sales since 1958.
- Environmental Site Assessment by Arc Environmental Consultants, 1995: Referenced site as having a long history of use as an automotive repair and sales facility.
- Kittery Town Documents: Prior CEO approvals identified the site as auto sales and service; a sign approval document for Anderson Auto Sales; tax record identified parcel as auto sales and service.
- Documentation from York Community Services Association cited automobile donations to York and Kittery.
- Presented an aerial photo identifying similar uses in the immediate area.
- Applicant wishes to continue a small-scale, used car sales operation to supplement auto repair service.

Brian Boyle noted he lives on Cutts Road. There was no objection from Board members or the audience.

- Pierre Puffer: Thanked members in the audience for supporting his efforts; only wants to sell 3-4 cars, not a large scale sales center; wants to continue to improve building and business.
- Stephen Young: Testified the previous owner of the business had an auto sales.
- Larry Newman: Mr. Puffer is passionate about what he does; it is important to be able to buy a good, used vehicle at a reasonable price, from an honest person; what about businesses who place cars and boats for sale on their property for extended periods of time?
- Bob Harris: Has lived on Cutts Road since 1959; there has always been a garage with auto sales at this site.

- Don West: Has lived in Kittery all his life; starting in the late 50's or early 60's, cars have always been sold on this property; allowing used car sales requires state dealer plates and records.
- Russell Allen, Eliot: Was born and raised in this area, and this site has always sold and repaired cars.
- Larry Dyer: Owns Import Auto Body and Highway Auto Repair since 1988; believes the MU zone was to restrict 'mall sprawl'; important to bring business into Kittery, and be pro-business.
- Michael Guy, lives behind Puffer business: This area has a factory, two car washes, other car sales; there are no environmental issues; the state regulates used cars with the toughest regulation being the ability to repair cars sold, which Mr. Puffer has in place; allowing him to sell cars will improve the property as he will continue to invest in his business.
- Greg Swan, Cutts Road: When he could not deliver his car for repairs, Mr. Puffer fixed his vehicle, delivered it to him and then walked home.
- Dave Daley: Has known Mr. Puffer for 30 years, and believes him to be honest and generous; cars have been sold at this site for over 35 years; he should be allowed to build and improve his business, generating more taxes for the town.
- Pete Downs: Worked with Mr. Puffer for 3 years; spoke of improvements to the business over the years; work is sparse in the winter, allowing used car sales will help keep all services available.

There was no further testimony. The CEO provided:

- This is a non-conforming lot with non-conforming structure located within the Mixed Use Zone.
- In 2011, Mr. Puffer submitted a business use application for his property, in which the proposed use was listed as "Auto Repair". This was a permitted use, and his business received approval to operate and conduct auto repair.
- In 2013, Mr. Puffer submitted a business use application for his property, in which the proposed use was listed as "buy and sell used autos to benefit sales of low to mid-range priced vehicles to people from Maine & New Hampshire". The zoning ordinance for the Mixed Use zone did not allow used vehicle sales, and the application was denied.
- In May of this year, Mr. Puffer submitted a business use change application for his property in which the proposed use was "Auto Repair and Used Auto Sales". Auto Repair was already approved for this property in 2011, but used vehicle sales is not allowed in the Mixed Use zone.
- At the point of having received a third application for this property, I asked the Town Attorney to review the most current application and previously submitted applications and Notices of Decisions. Mr. McEachern responded with a memo, included in your packet. The business use application for used car sales was denied.
- It appears, from the application and materials submitted with the Board of Appeals application, that Mr. Puffer's appeal is based on his belief that the used car sales is a "continuous non-conforming use".

- Title 16.7.3.4 states “A lot on, or structure in, which a nonconforming use is discontinued for a period exceeding one (1) year, or which is superseded by a conforming use, loses its status as a non-conforming use”. Mr. Puffer’s application, and accompanying submittals, show that there has been periodic vehicle sales on the property over the years. The submittals, however, have not shown a “continuous” non-conforming use. There have been no legal vehicle sales occurring from the property since the business use approval for auto repair in 2011.
- It is the determination of the Code Enforcement Office, based along with the determination by the Town Attorney, that this is not a continuing non-conforming use, and not an allowed use, therefore is not permitted.

Duncan McEachern: Agreed this is about non-conforming uses; after hearing the testimony, he is not prepared to say the property has not sold vehicles over the years, but there is no evidence that Mr. Puffer has legally sold vehicles since 2011. The testimony is sincere, but if the business has not been selling cars in the past 3 years, it is not a permitted use or special use exception, as use must continue without interruption. Title 16.7.3.4: *A lot on, or structure in, which a nonconforming use is discontinued for a period exceeding one (1) year, or which is superseded by a conforming use, loses its status as a nonconforming use. The uses of the land or structure must thereafter meet the provisions of this Code.* The issue is not the last 50 years, but the last 3 years - has it been discontinued for more than a year? If so, it loses its status of a non-conforming use. This is not personal. There is no license to sell used cars. Have taxes been paid to sell used cars?

Niles Pinkham: Whether legal or illegal, he has seen cars for sale on the site within the past three years.

Gary Beers: Agrees with Town Attorney regarding continuance of a non-conforming use. He read from Title 29A, Section 951, Licensing of Dealers:

Definition. A person is "engaged in the business of buying, selling, exchanging, offering to negotiate, negotiating or advertising a sale of vehicles" if that person:

A. Buys vehicles for the purpose of resale:

B. Sells more than 5 vehicles in any 12-month period; or

C. Advertises in any form 3 or more vehicles for sale or displays 3 or more vehicles for sale within a 30-day period on premises controlled by that person.

Did Mr. Puffer sell cars in 2011, 2012 and 2013? He noted he has proof that Mr. Puffer sold a car at this business in December, 2011. He asked Mr. Puffer if he sold a car from the lot in 2012 and 2013. Mr. Puffer stated he did. It is not the Board's position to enforce whether he legally sold cars, but rather the state's responsibility. The single issue before the Board is the continuation of a legally established non-conforming use.

Mr. McEachern: The Board should define the extent of non-conforming use, i.e.: physical capacity.

Mr. Costa: The issue before the Board is determining a continuation of use.

Mr. Boyle: It does appear that auto sales have been continued to the present, but he would not want to see an expansion of the property, or adjacent properties, to become a used car lot.

Mr. Wilson: Why is this considered a business use change, per the application before them?

Attorney Orso: It is a function of the application process in Kittery. If there were an application for continuing use of a non-conforming use it would be less confusing.

Mr. Beers: Title 16.10.3.6 Business Use Review:

All business use including the following must be reviewed by the CEO and Town Planner to ensure compliance with the requirements of this Code including:

- 1. Movement of an existing commercial or business entity from like to like facilities/use where major building/site modifications are not made;*
- 2. Movement of an existing commercial or business use into related facility/use buildings;*
- 3. Establishment of new commercial or business entity in an existing facility where intensity of use is not significantly different.*

Kittery does not have a business registration requirement. This is a code method to ensure that new businesses receive necessary permits.

Ryan McCarthy, CLD: It is not common sense for a property owner to file a business use change when there is no change of use. Mr. Puffer's 2011 application was to continue the auto repair business as before, but did not include auto sales on the application. CLD subsequently supplied supplemental information that included used car sales. The town's notice of decision for approval, however, only included repair, and did not include used car sales. In 2013, Mr. Puffer again submitted the application, this time including used car sales, and this application was denied. In 2014, CLD re-submitted the application with additional information to support the request for used car sales as a continuing non-conforming use.

Mr. Costa: The history of selling used cars on the property is credible. Discussion followed regarding special exception use and the definition of 'retail use' and 'used car lot'.

Mr. Beers: In the previous code, used car sales was grandfathered as a special exception in the mixed-use zone, however, this use was omitted in the new code language in 2004.

Mr. Wilson: The Board could address limitations of sales, that then reflects what has occurred historically as well as what is allowed legally. There doesn't appear to be any state documents since 2007.

Mr. Beers: Conditions can be placed that support Title 16.6.6.1.2: *Use will not prevent the orderly and reasonable use of permitted or legally established uses in the zone wherein the proposed use is to be located, or of permitted or legally established uses in adjacent use zones.* Discussion followed regarding limiting the number of used cars allowed on the property at any time.

[Mr. Puffer left the meeting briefly]

Mr. Wilson: It would be much clearer if there is a limit on number of used cars sold.

Mr. Beers: The Board could limit the number of used cars on the property, but cannot limit the number of used cars sold. The Basis for Decision authorizes the Board to place conditions on the property.

Mr. Orso: Agrees the Board could limit the number of used cars on the property at any one time.

Mr. Puffer: The most cars he would have for sale at any one time is 4. He is fine with a cap on the number allowed, he just wants the right to sell used cars.

Mr. Beers: He would be more comfortable with 5 at any one time, tying in with state statute, contemplating future ownership.

CEO: The Board would have to place conditions for her to enforce the decision.

Mr. Beers moved to grant an Administrative Appeal to Pierre Puffer, Puffer & Sons Land Management, Inc., to the terms of Title 16.3.2.13, 16.10.3.6, 16.6.4.1, 16.7.3.4 and 16.7.3.5.1, overturning the CEO and Planner's decision to prohibit used car sales at his business at 421 U.S.

Route 1 in the mixed-use zone, with the condition of restricting the applicant and future owners to allow no more than five (5) used cars at any one time on property identified as Map 50 Lot 5.

Mr. Pinkham seconded

Motion carried unanimously

Mr. Wilson amended the motion to include Titles 16.6.6.1 and 16.6.6.2 have been satisfactorily met, as applicable.

Mr. Beers seconded

Motion carried unanimously

Findings of Fact:

1. Pierre Plummer, applicant, Puffer & Sons, LTD, 421 U.S. Route 1, map 50, lot 5 was represented by Attorney Greg Orso and Ryan McCarthy, P.E., CLD Engineers, who also testified on the applicant's behalf.
2. Applicant appeared before the Board requesting an Administrative Appeal to the decision of the Code Enforcement Officer to allow the sale of used cars at his automotive garage facility.
3. The question before the Board was whether there was a continuation of a historic, nonconforming use.
4. The CEO and Town Attorney stated the use discontinued for more than one year and was, therefore, not permitted as a continuing, non-conforming use.
5. A 2011 application was approved for the use of the property as a garage.
6. Supplemental data including the used car sales use was submitted, but this use was not included in the 2011 approval.
7. A subsequent application in 2013 included the addition of used car sales was denied, and was not appealed by the applicant.
8. The May, 2014 application including used vehicle sales was denied by the CEO, and an opinion provided by the Town Attorney, Duncan McEachern, supporting the denial.
9. There was voluminous public testimony (11) supporting the historical and continued use of the property for the sale of used cars since the 1950s, and the value of the business to Kittery.
10. There have been no applications found for state used car permits from 2007 to the present.
11. The Town Attorney noted there was no documentation of sales in last three years.
12. Mr. Beers provided personal testimony a vehicle was sold in December, 2011, and Mr. Puffer testified at least one used vehicle was sold at the site in 2012 and 2013.
13. The Board found used car sales had not been discontinued and, as a legal non-conforming use, could continue.
14. Mr. Beers read state statute regarding licensing of dealers of used cars, and the sales of 5 cars or less.

Mr. Beers moved to accept the Findings of Fact as read

Mr. Wilson seconded

Motion carried unanimously

Conclusion

In the Appeal to an Administrative decision, the Board determined that the historic use had continued without interruption, and that Title 16.7.3.4 did not apply, and conditioned the approval requiring the applicant or subsequent property owners may not display anymore than five (5) cars at any one time.

Mr. Beers moved to accept the Conclusion as read

Mr. Boyle seconded
Motion carried unanimously

Mr. Costa noted this approval is not the issuance of a building permit, and any aggrieved party has 45 days to appeal this decision to Superior Court.

ITEM 2: Puffer & Sons Land Management, Inc., Map 50 Lot 5, Mixed-Use (M-U); 421 U.S. Route 1. Pierre Puffer requesting Miscellaneous Variation request to the terms of Title 16, Chapter 10, Section 3.6, Title 16, Chapter 3, Section 2.13, & Title 16, Chapter 6, Section 4.3 to continue historical use of property as both auto repair and used auto sales.

Mr. Orso withdrew their request to hear this Miscellaneous Variation.

ITEM 3: David & Cathy Guilbeault, Map 1 Lot 2, 5 Island Avenue, Mixed Use-Badgers Island (MU-BI). David & Cathy Guilbeault requesting Miscellaneous Variation request to the terms of Title 16, Section 3.2.4.D, to demolish an existing addition and to construct a new addition.

David Guilbeault: Elected to rest on the information submitted in the application.
There was no public testimony. The CEO provided:

1. This is a conforming lot with nonconforming structure located within the Mixed Use – Badgers Island and Shoreland zones. Mr. and Mrs. Guilbeault have proposed to demolish an existing portion of the house (18'x19') and to construct a new addition in the same footprint.
2. Title 16 Section 3.2.14.D requires a minimum ten foot side yard setback. The structure is currently setback one foot from the side property line. The new structure is proposed to be no closer than the existing structure.
3. The 30% requirement is not applicable as the property is located greater than 100 feet from the water.

Mr. Beers had no concerns, and noted Title 16.7.3.5.5 and 16.7.3.5.6 are incorrectly worded and need to be revised.

Remaining Board members agreed they have no concerns.

Mr. Beers moved to grant a Miscellaneous Variation to Title 16.3.2.4.D for David and Cathy Guilbeault to demolish an existing addition and construct a new addition at their 5 Island Avenue property, Map 1, Lot 2, MU-BI zone, with no conditions.

Mr. Boyle seconded
Motion carried unanimously

Findings of Fact

1. David and Cathy Guilbeault requested a Miscellaneous Variation to Title 16.3.2.4.D, specifically the side setback requirements in the Mixed-Use Badgers Island zone.
2. The request is to demolish an existing 18'x19' structure and replace with a new structure in the same location.

3. A 10-foot side setback is required where a one-foot setback exists.
4. The proposed new structure is no closer than the existing structure.
5. The property is outside of the 100-foot shoreland setback, and the 30% expansion restriction does not apply.
6. Title 16.6.6.1 and 16.6.6.2 have been substantially met, where applicable.

Mr. Pinkham moved to accept the Findings of Fact as read

Mr. Boyle seconded

Motion carried unanimously

Conclusion:

The Board of Appeals has the authority to grant a Miscellaneous Appeal per Title 16.7.3.5.5.A, as the proposed construction will be no more nonconforming than the existing condition.

Mr. Boyle moved to approve the Conclusion as read

Mr. Pinkham seconded

Motion carried unanimously

Mr. Costa noted this approval is not the issuance of a building permit, and any aggrieved party has 45 days to appeal this decision to Superior Court.

ITEM 4: Greg Swanton, Map 60 Lot 20A, 9 Old Cutts Rd, Residential-Rural (R-RL). Greg Swanton requesting Miscellaneous Variation request to Table 16.9, to demolish an existing garage and to construct a new garage.

Greg Swanton: Existing garage is falling down and he would like to rebuild in the same location.

There was no public testimony. The CEO provided:

1. This is a non-conforming lot with non-conforming structure located within the Residential-Rural zone. Mr. Swanton has proposed to demolish an existing garage and to construct a new garage.
2. The applicant is appealing Table 16.9 and the R-RL setbacks requirement (16.3.2.1.D).
3. Table 16.9 requires a minimum 100-foot setback from wetlands greater than an acre in size. The garage is currently setback approximately 20 feet from the wetland. The new structure is proposed to be no closer to the wetland than the existing structure.
4. Title 16.3.2.1.D requires a minimum 40-front property line setback. The house is currently setback approximately 28 feet from the front property line. The new structure will be set back further than the existing structure, and will be no closer than the existing structure.

Mr. Beers: Does the wetland exist as mapped?

CEO: The map included in the application was prepared by Joe Noel, a Wetland Scientist, for a previous septic replacement.

Board members had no further questions.

Mr. Pinkham moved to grant a Miscellaneous Variation to Table 16.9 for Swanton, Map 60 Lot 20A, 9 Old Cutts Rd, Residential-Rural (R-RL) in order to demolish and reconstruct a garage, with no conditions.

Mr. Beers seconded

Motion carried unanimously

Findings of Fact

1. Greg Swanton, 9 Old Cutts Road, R-RL zone requests a Miscellaneous Variation to Table 16.9 and Title 16.3.2.1.D.
2. Request is to demolish an existing garage and reconstruct a larger structure that will be no more non-conforming than what currently exists.
3. Table 16.9 requires a minimum 100-foot setback from wetlands greater than an acre in size. The garage is currently setback approximately 20 feet from the wetland. The new structure is proposed to be no closer to the wetland than the existing structure.
4. Title 16.3.2.1.D requires a minimum 40-front property line setback. The house is currently setback approximately 28 feet from the front property line. The new structure will be set back further than the existing structure, and will be no closer than the existing structure.
5. There are no conditions on the approval.

Mr. Boyle moved to accept the Findings of Fact

Mr. Beers seconded

Motion carried unanimously

Conclusion

The Board has the authority under Title 16.7.3.5.5.A to allow for the repair and expansion of a structure if the proposed structure is no closer than or no more non-conforming than the existing condition.

Mr. Pinkham moved to accept the Conclusion

Mr. Beers seconded

Motion carried unanimously

Mr. Costa noted this approval is not the issuance of a building permit, and any aggrieved party has 45 days to appeal this decision to Superior Court.

Minutes: August 5, 2014

Mr. Wilson moved to accept the minutes of August 5, 2014 as presented

Mr. Beers seconded

Motion carried unanimously

The Board discussed the draft agenda format to be implemented for future meetings. Following review and discussion, the following items will be included in future BoA agendas:

1. Call to order
2. Introduction
3. Pledge
4. Roll Call
5. Public Hearing items

6. Review of Minutes
7. Unfinished Business
8. New Business
9. Board Issues/Comments
10. Adjournment

Mr. Wilson: Would like to see the Board have regular discussions on procedures or issues, especially when there is a short hearing agenda.

The Chairman will develop a general statement to recite following the roll call outlining the public hearing process, such as: Each hearing item will begin with a presentation by the applicant and/or agent, followed by testimony from members of the public, presentation by the Code Enforcement Officer, discussion by the Board, a motion, Findings and Conclusion.

A meeting has been scheduled for September 9. Mr. Wilson will not be available, so a quorum of four members will be needed.

Mr. Costa moved to adjourn
Mr. Wilson seconded
Motion carried unanimously

The Board of Appeals meeting of August 19, 2014 adjourned at 9:40 p.m.

Submitted by Jan Fisk, Recorder, August 25, 2014